Supreme Court, U.S.
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87-2135

No.

IN THE
Supreme Court of the United States
October Term, 1987

ISLAMIC REPUBLIC OF IRAN BROADCASTING,
Petitioner,

v.

N.K. BEHROOZIAN and JERRY ABITBOL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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June 29, 1988

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2184

QUESTIONS PRESENTED

1. Whether a jury should be allowed, over objection, to decide an issue of foreign law?

2. Whether the District Court, even without a request, was obligated to instruct the jury on a controlling issue in the case?

LIST OF PARTIES

The following parties appeared below:

1. Islamic Republic of Iran Broadcasting, which is an agency and instrumentality of the Islamic Republic of Iran.

2. Sotheby Parke Bernet, Inc., which was initially a party below but was dismissed by consent in the District Court.

3. N.K. Behroozian, who is a citizen of Iran and a resident of France.

4. Jerry Abitbol, who is a citizen of the United States and of the State of New York.

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IN THE

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No.

ISLAMIC REPUBLIC OF IRAN BROADCASTING,
Petitioner,

v.

N.K. BEHROOZIAN and JERRY ABITBOL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Islamic Republic of Iran Broadcasting, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled proceeding on April 1, 1988.

OPINION BELOW

The denial of the motion for rehearing is unreported. The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 839 F.2d 780. The denial of the motion and the opinion are reprinted in the appendix, hereto, pp. 1a-5a, *infra*.

The United States District Court for the District of Columbia wrote no opinion in this case. The judgment on the jury verdict is reprinted in the appendix, p. 6a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1988. IRIB petitioned timely for rehearing on March 4, 1988, and the petition was denied on April 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RULE INVOLVED

Rule 44.1, F.R.C.CP.

Determination of Foreign Law

> A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

STATEMENT OF THE CASE

Islamic Republic of Iran Broadcasting ("IRIB") sued N.K. Behroozian and Jerry Abitbol for title to and possession of a Stradivarius violin and associated items ("the Stradivarius"), which Behroozian and Abitbol had consigned to Sotheby Parke Bernet, Inc., for auction.[1] Behroozian and Abitbol counter-

[1]The District Court had jurisdiction pursuant to 28 U.S.C. § 1332(a)(4).

claimed for disparagement of property and tortious interference with contract.

At trial, IRIB's evidence showed that it had bought the violin shortly before the downfall of the Shah and had never sold it in accordance with the applicable regulations to anyone. Behroozian claimed that he had bought the violin from another instrumentality of Iran, the Mostazafan Foundation ("Foundation"). Iran's legal experts, Dr. Safai and Dr. Vafai,[2] testified without expert contradiction that unless the Stradivarius was sold to the Foundation in accordance with the regulations, the Foundation had not acquired title and could not convey it.

Behroozian and Abitbol presented no evidence directly contradicting the foregoing. They did, however, present over IRIB's repeated objections, the testimony of Christian Borguet, a French attorney, as to the legal circumstances which prevailed in Iran after the revolution in early 1979. Bourguet testified that after the revolution there was no constitution, and law was "provisory." There were revolutionary courts, some self-appointed, which confiscated property and sometimes tried and executed people. Iran was "governed" by partly secret, revolutionary councils with technical decisions only made by the official governmental bodies, and above both the revolutionary councils and the official government was Imam Khomeini. Records were not kept of confiscations because "too much people [were] confiscating things all over the country." The students who took the American hostages did not act on behalf of anyone. The revolutionary council wanted the hostages released, but the students had the support of "hundreds, thousands, sometimes millions of people chanting in the street," "so the laws could not be applied." In short,

[2]Dr. Vafai was the Iranian legal specialist at the Library of Congress and the author of *Commercial Laws of the Middle East, Iran* (Oceana Publications, 1982).

he testified, as the Court of Appeals later found, that there was "an absence of law" (App. p. 4a) in Iran at the time.

The District Court instructed the jury, as IRIB requested, that the rightful owner of property could recover property not only from one guilty of an unlawful taking but also from a good faith purchaser from someone other than the owner since a thief could not pass good title. The jury nevertheless found for Behroozian and Abitbol, and the District Court entered judgment on the jury verdict (App. 6a). The Court of Appeals affirmed and denied a petition for rehearing.

REASONS FOR GRANTING THE WRIT

I. The District Court erred in allowing the jury, over objection, to decide an issue of foreign law.

A determinination of foreign law requires two steps, first, determining that the law exists and second, determining how it is to be construed. Although Rule 44.1, F.R.C.P., provides that a determination of foreign law shall be "*treated* as a ruling on a question of law" [emphasis supplied], the first step requires resolution of a question of fact, and only the second resolution of a question of law. *Eastern Bldg. & L. Asso.* v. *Williamson,* 189 U.S. 122, 126-127 (1903); *Walsh* v. *Public Service Co.,* 30 A.2d 494, 496 (N.H. 1943); *See, Crespo* v. *United States,* 399 F.2d 191, 192 (Ct.Cl. 1968); *First National City Bank* v. *Compania de Aquaceros, S.A.,* 398 F.2d 779, 782 (5th Cir. 1968); *United States* v. *Hyde,* 448 F.2d 815 (5th Cir. 1971) (Rives, J. dissenting), *cert. den.,* 409 U.S. 1058 (1972).

Although juries are said to decide issues of fact, this is not always the case (9 Wigmore, *Evidence,* §2550, p. 640, Chadbourne rev. 1981). The District Court's determination herein

as to the existence of the law was a determination of fact, and the District Court was required to make it because Rule 44.1, F.R.C.P., as the Court of Appeals found, requires the court to make a determination of foreign law (App. p. 4a).

Although the instruction which the District Court gave the jury accepted appellant's view both as to (1) the existence and (2) the construction of Iranian law, the jury heard two views as to the existence of law. In addition to the District Court's instruction, the jury heard, despite repeated objections, Bourguet's testimony that there was no law in Iran at the time. The District Court never instructed the jury that it should disregard this testimony.

On the contrary, the District Court repeatedly instructed the jury that it was the sole judge of the facts and, on three occasions, instructed it that it should disregard all comments of the court, including "setting forth the law in these instructions," in arriving at its own findings of fact. Consistent with those instructions the jury could have decided that the law of Iran described in the District Court's instruction was merely the law on the statute books, but that law was "provisory" as Bourguet testified; in fact, there was no law. Indeed, consistent with the District Court's instructions to ignore all its comments on issues of fact, the jury *should* have ignored the court's instructions on the existence of law and considered only Bourguet's testimony because the existence of law is an issue of fact.

The District Court instructed the jury, in substance, that property improperly taken from a rightful owner could be recovered from whoever possessed it including a purchaser in good faith. If there was no law, however, a "legally" improper confiscation of the violin and transfer to the Foundation, as suggested by Bourguet's testimony, would not be im-

proper, and the rightful owner would not have a right to recover from a good faith purchaser.

Petitioner is not arguing that the jury gave improper weight to testimony in disregard of the District Court's instructions. Petitioner is aware that the jury is presumed to follow the court's instructions. The difficulty here is that a witness was improperly permitted to testify on the factual issue of the existence of law in violation of Rule 44.1, F.R.C.P. In view of the District Court's instruction that the jury was to disregard its comments on issues of fact, it cannot be fairly concluded that Bourguet's testimony that there was in fact no law did not usurp the District Court's function.

As far as undersigned counsel knows, there is no other decision from a court in the United States addressing the issue whether testimony that there is "no law" is testimony as to law within the meaning of Rule 44.1, F.R.C.P. Nevertheless, the issue is an important one, because United States courts, due to the internationalization of the American economy, are more and more frequently asked to resolve issues of foreign law where the foreign countries involved are in political turmoil. A clearly wrong Federal Circuit Court holding that testimony that there is no law is not testimony as to law will do great mischief if allowed to stand.

II. The District Court committed plain error in failing to instruct the jury regarding the Foundation's legal inability to convey good title to the Stradivarius to Behroozian.

Because IRIB's uncontradicted legal experts established that the Foundation could not transfer good title to Behroozian unless it had received the Stradivarius in accordance with the regulations, the jury should have been instructed that, even

if it found that Behroozian had purchased the violin in good faith from the Foundation, it could not find for Behroozian unless it also found that IRIB had not shown that there was no legal transfer to the Foundation. Behroozian put on no evidence showing a proper transfer from IRIB to the Foundation so IRIB's evidence was uncontradicted. A properly instructed jury would have had to find that IRIB's evidence of no legal transfer, though uncontradicted, was nevertheless insufficient to carry its burden of proof before rendering judgment in Behroozian's favor.

The jury in this case should have been so instructed even though the District Court was not requested to give such an instruction.

> It is the inescapable duty of the trial judge to instruct the jurors, fully and correctly, on the applicable law of the case, and to guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for truth. The court must instruct the jury properly on the controlling issues in the case even though there has been no request for an instruction or the instruction requested is defective. [9 Wright & Miller, *Federal Practice and Procedure:* Civil §2556, at 654-655, footnotes omitted.]

Although the foregoing principle, sometimes referred to as the "plain error" rule, is in conflict with the literal language of Rule 51, F.R.C.P., which provides in pertinent part that "[n]o party may assign as error the giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds for the objection," the principle is accepted in most Circuits. *E.g., Pate* v. *Seaboard R.R., Inc.*, 819 F.2d 1074 (11th Cir. 1987); *Nowell* v. *Universal Elec.*

Co., 792 F.2d 1310 (5th Cir.), *cert. den.*, 107 S. Ct. 578 (1986); *Morris* v. *Getscher*, 708 F.2d 1306 (8th Cir. 1983); *Beardshall* v. *Minuteman Press Intern., Inc.*, 664 F.2d 23, 27 (3rd Cir. 1981); *Cohen* v. *Franchard Corporation*, 478 F.2d 115, 124 (2d Cir.), *cert. den.*, 414 U.S. 857 (1973); *see* 5A Moore's *Federal Practice*, para. 51.04, p. 51-20 and cases collected at n. 4. The principle, however, as Behroozian argued in his appellate brief, has never been accepted in the District of Columbia Circuit, *Hobson* v. *Wilson*, 737 F.2d 1, 32 n. 96 (1984), *Dellums* v. *Powell*, 566 F.2d 167, 190-191, n. 63, *cert. den.*, 438 U.S. 916 (1977), and was at least implicitly rejected by the appellate court in this case (App. 5a).

The error, we respectfully submit, was outcome determinative, because, although the jury could theoretically have found that IRIB had not carried its burden of proof concerning a legal transfer to the Foundation, this outcome was unlikely because Behroozian presented no evidence showing a legal transfer. Because a miscarriage of justice has resulted, because a foreign government is the victim of the miscarriage, and because the District of Columbia Circuit's position as to the applicability of the "plain error" rule conflicts with that of the other Circuits, this Court should grant review.

CONCLUSION

For all the reasons advanced, the petition should be granted.

Respectfully submitted,

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June 29, 1988

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-7056 **September Term, 1987**

Islamic Republic of Iran Broadcasting,
a/k/a, IRIB

v.

Sotheby Parke Bernet, Inc.

BEFORE: Mikva and Williams, Circuit Judges; Myron L. Gordon, Senior Circuit Judge, U.S. Court of Appeals for the Eighth Circuit

ORDER

Upon consideration of Appellant's Petition for Rehearing, filed March 4, 1988, it is

ORDERED, by the Court, the petition is denied.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit
Filed Apr 01 1988
CONSTANCE L DUPRE
Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 87-7056

ISLAMIC REPUBLIC OF IRAN BROADCASTING,
a/k/a, IRIB, APPELLANT
v.
SOTHEBY PARKE BERNET, INC.
v.
N.K. BEHROOZIAN, et al.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 82-01371)

Argued November 19, 1987

Decided February 5, 1988

Thomas G. Corcoran, Jr., with whom *Louis E. Emery* was on the brief for appellant.

Skip Short, with whom *Jacob Dweck* was on the brief for appellees.

Before: MIKVA and WILLIAMS, *Circuit Judges*, and GORDON,* *Senior District Judge*.

Opinion for the Court filed by Senior District Judge GORDON.

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*Of the United States District Court for the Western District of Wisconsin, sitting by designation pursuant to 28 U.S.C. § 294(d).

Islamic Republic of Iran Broadcasting v. Sotheby Parke Bernet, Inc., et al.
No. 87-7056

GORDON, Senior District Judge*: This property dispute arises out of unusual circumstances involving power struggle and property confiscation shortly after the Iranian revolution. Prior to the revolution, an agency of the Shah's government, National Iranian Radio and Television, purchased two violins and two bows from a dealer in New York, Jacques Francais. Jacques Francais eventually spotted a description of one of the violins, the Burmester Stradivarius, in an auction catalogue issued by Sotheby Parke Bernet, Inc. [Sotheby's], but the catalogue description failed to indicate that National Iranian Radio and Television had been an owner. Mr. Francais reported this deficiency to Sotheby's as well as to the Iranian delegation at the United Nations. Sotheby's subsequently withdrew the violin from its auction.

The post-revolution successor to National Iranian Radio and Television, Islamic Republic of Iran Broadcasting [IRIB], filed a complaint against Sotheby's in the district court for the District of Columbia seeking resolution of competing ownership claims. Sotheby's interpleaded the parties for whom it intended to sell the violin: N.K. Behroozian and Jerry Abitbol.

Following a jury trial, a judgment was entered in favor of the third-party defendants in the amount of $15,000 for their disparagement of property and tortious interference with contract counterclaim. The plaintiff has appealed to this court contending that a number of factual and procedural matters require reversal. Because we conclude that IRIB's arguments on appeal do not warrant divergence from the jury's disposition of this case, we affirm.

The Burmester Stradivarius was consigned to Sotheby's by Mr. Abitbol who was acting as a sales agent for N.K. Behroo-

zian. Mr. Behroozian claims to have purchased the violin in Iran shortly after the revolution at a government auction-type sale conducted by the Mostazafan Foundation [Foundation]. The Foundation was established to sell property confiscated from the Shah, his family and collaborators, and from persons who fled the country at the time of the revolution.

The jury was required to determine who lawfully owns the Burmester Stradivarius: IRIB or Mr. Behroozian and his agents. IRIB contends that the violin reached the Foundation through illegitimate means. The appellant also contends that the Foundation did not in fact engage in a practice of confiscating property from other government agencies such as National Iranian Radio and Television. The IRIB further asserts that as a matter of law the Foundation could not have transferred legitimate title. Consequently, it urges that either as a matter of fact or law, Mr. Behroozian's title to the violin should have been rejected in favor of the IRIB.

The jury's interpretation of the varied and frequently conflicting documentary evidence and testimony is entitled to great weight. Nothing that the IRIB points out persuades us that the evidence was insufficient to support the jury's verdict. Nor did Judge Bryant's rulings denying summary judgment and directed verdict, or admitting certain evidence, amount to error of such magnitude that we discern any abuse of discretion. We similarly conclude that the judge's charge to the jury was not clearly erroneous and does not warrant reversal.

The IRIB complains that in permitting a French attorney, Christian Bourguet, to testify about general policies of property confiscation prevailing in Iran when Mr. Behroozian consummated his Stradivarious purchase, the district court abdicated its responsibility to determine foreign law. While it is true that Rule 44.1, Federal Rules of Civil Procedure, provides that foreign law is to be determined by the court as a matter of law, *see also Railway Labor Executives' Ass'n v.*

United States R.R. Retirement Bd., 749 F.2d 856, 860 (D.C. Cir. 1984), our review of Mr. Bourguet's testimony persuades us that his testimony did not usurp the court's function.

Mr. Bourguet's testimony was primarily descriptive of conditions in Iran, and he was competent to tender such description. Mr. Bourguet represented the government of Iran and various of its agencies after the revolution until late 1982. He visited the country during the period relevant to this case approximately 25 times. He also met with the Revolutionary Council. Based on his personal observations of the country during this time and his experience with government officials, Mr. Bourguet described various lines of authority and viewpoints in the government. He also described the purposes and confiscation operations of the Mostazafan Foundation. It was well within the domain of the jury to consider and evaluate the credibility and relevance of his testimony with respect to these circumstances.

Mr. Bourguet did not describe Iranian law regarding the authority of the Mostazafan Foundation to transfer effective title or to confiscate property from other government agencies like the IRIB. Indeed, his testimony could be characterized as a description of the absence of law.

The law regarding the Foundation's authority to transfer good title was embodied in the jury instruction proffered by the IRIB and ultimately tendered to the jury. Having failed to object to this instruction before the jury retired to consider the case, the IRIB may not now object to Mr. Bourguet's testimony or claim that its suggested instruction was erroneous.

For the reasons set forth above, the judgment of the district court is affirmed.

United States Court of Appeals
For the District of Columbia Circuit
FILED FEB 5 1988
CONSTANCE L. DUPRE
Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Islamic Republic of Iran Broadcasting	)	
	)	CIVIL NO. 82-1371
vs.	)	
Sotheby Parke Bernet	)	

JUDGMENT ON THE VERDICT
(For Defendant)

This cause having been tried by the Court and a Jury, before the Honorable William B. Bryant, Judge presiding, and the issues having been duly tried and the Jury having duly rendered its verdict; now therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff Islamic Republic of Iran Broadcasting take nothing on the complaint against defendants N.K. Behroozian and Jerry Abitbol, and that the said defendants have and recover costs from the said plaintiff.

IT IS FURTHER ORDERED that the counter-plaintiffs-defendants N.K. Behroozian and Jerry Abitbol have and recover of and from the counter-defendant plaintiff Islamic Republic of Iran Broadcasting the sum of FIFTEEN THOUSAND DOLLARS ($15,000.00) on the counter claim against the counter-defendant plaintiff.

Dated: 2/12/87

JAMES F. DAVEY, Clerk

By: /s/ Linda L. Romero
Linda L. Romero

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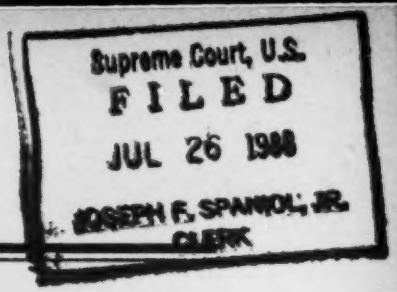
DISTRICT OF COLUMBIA



No. 87-2135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ISLAMIC REPUBLIC OF IRAN BROADCASTING,

Petitioner,

v.

N.K. BEHROOZIAN and JERRY ABITBOL,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Attorney for Respondents

July 26, 1988

Questions Presented

1. Does an evidentiary objection, raised for the first time on appeal, support a writ of certiorari?
2. Does IRIB's objection to its own proposed jury instruction, raised for the first time on appeal, support a writ of certiorari?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ISLAMIC REPUBLIC OF IRAN BROADCASTING,

Petitioner,

v.

N.K. BEHROOZIAN and JERRY ABITBOL,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The respondents N.K. Behroozian and Jerry Abitbol respectfully pray that the petition for a writ of certiorari be denied.

Statement of the Case

Islamic Republic of Iran Broadcasting ("IRIB") seeks review of a judgment of the Court of Appeals which affirmed a judgment on a jury verdict in a case which turned upon conflicting evidence and the credibility of witnesses.

The petition is frivolous. There are no issues meeting the criteria set forth in Supreme Court Rule 17. In IRIB's appeal to the Court of Appeals, IRIB indicated its awareness that no appealable issue had been preserved for

review,[1] but it proceeded with its appeal anyway. Now IRIB has filed a petition for a writ of certiorari with no issue which could support such a request. By filing, IRIB prolongs the interference with N.K. Behroozian's ("Behroozian") property (which is being held by Sotheby Parke Bernet, Inc., pending the conclusion of this litigation) and further increases the cost to Behroozian and Jerry Abitbol ("Abitbol") of this litigation.

In its Statement of the Case, IRIB portrays the trial as one at which IRIB presented evidence that it owned and did not transfer the violin, without contradiction by Behroozian and Abitbol. IRIB lost the case, according to its implication, because of the court's rulings.

This is untrue. During the trial IRIB prevailed on most issues of law. IRIB lost this case, not because of any ruling on the law, but because its witnesses were not credible.

Under Iranian law there was a legal presumption that Behroozian was the lawful owner of the violin. IRIB had the burden of proof to show that in the chain of title from IRIB to the Mostazafan Foundation ("Foundation") to Behroozian, the violin had left IRIB's offices by unlawful means.[2]

IRIB was unable to meet this burden. IRIB was unable to prove that the violin was ever at its office after the revolution in early 1979, or that the violin was transferred

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[1] See IRIB's September 15, 1987, Memorandum in Support of Motion for New Trial, at p. 5 ("a cursory review of the record immediately indicated the failure of prior counsel to file a motion for a new trial. Such review, in light of the failure to file such a motion, revealed no appealable issue."), and supporting Affidavit of Thomas Corcoran, Jr., ¶10.

[2] See Brief for Appellees in Court of Appeals, pp. 10-11. In its proposed jury instructions, IRIB stated that: "You are further instructed as a matter of law that a presumption of ownership exists in favor of Behroozian, by reason for him being in present possession of the instruments," (Court of Appeals Appendix A697) and the court so instructed the jury (A1503, 1548).

without authority. IRIB relied primarily upon two witnesses: Mohammed Biglaripour, who testified IRIB had possession of the violin in 1979; and Karim Khodapanahi, who testified that IRIB did not legally sell or transfer the violin.

These witnesses were not credible. They contradicted each other. Their testimony was controverted. The jury was justified in finding that they had testified falsely and in rejecting all of their testimony, leaving IRIB with no material evidence at all.

The factual discrepancies were addressed at length in the Brief for Appellees in the Court of Appeals (pp. 11-28).[3] The Court of Appeals recognized this in its opinion stating:

> The jury's interpretation of the varied and frequently conflicting documentary evidence and testimony is entitled to great weight. Nothing that the IRIB points out persuades us that the evidence was insufficient to support the jury's verdict. 839 F.2d 780, at 782.

The jury's verdict was amply supported by the legal presumption in favor of Behroozian and IRIB's factual failure to rebut that presumption.

The issues now raised by IRIB were not raised by IRIB during the trial. IRIB objects, based upon Fed. R. Civ. P. 44.1, to testimony given by Christian Bourguet, but no objection based upon Fed. R. Civ. P. 44.1 was made

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[3] For example, Khodapanahi testified that he saw the violin on a table between French attorney Christian Bourguet ("Bourguet") and former Iranian Foreign Minister Sadegh Ghotbzadeh. Mr. Bourguet testified at the trial and directly disputed Khodapanahi's claim. Mr. Bourguet made an excellent witness and provided the jury with ample reason to conclude that Khodapanahi was lying. The record is replete with other instances where the jury should have found that IRIB's witnesses had lied and that IRIB's claims were false.

during the trial. Similarly, IRIB now objects to its own proposed instruction on the law (which the trial court adopted), although it never objected to its proposed charge during the trial. These contentions are frivolous.

REASONS FOR DENYING THE WRIT

I. No Fed. R. Civ. P. 44.1 objection was made by IRIB during the trial nor was there a basis for such an objection.

IRIB claims that Mr. Bourguet testified about the governing law in violation of Fed. R. Civ. P. 44.1 and that IRIB objected to this testimony.

IRIB is wrong.

IRIB has seriously distorted the record by suggesting that it made an Fed. R. Civ. P. 44.1 objection during the trial. At no time did IRIB object that Mr. Bourguet was testifying about foreign law in violation of Fed. R. Civ. P. 44.1. This objection was made for the first time on appeal.

In fact, IRIB did not make a single objection during Mr. Bourguet's testimony. IRIB waived voir dire of Mr. Bourguet. IRIB did not object to a single question posed to Mr. Bourguet. IRIB did not move to strike any of Mr. Bourguet's answers. IRIB did not request any instructions to the jury regarding any of Mr. Bourguet's testimony.[4]

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[4] Although Mr. Bourguet did not testify about the governing law, and while no Fed. R. Civ. P. 44.1 objection was made, counsel for IRIB evidently had no objection to a witness testifying about the law in Iran. Counsel for IRIB asked Biglaripour about the existence of certain laws in Iran (A1027). Counsel for IRIB asked Khodapanahi about IRIB's regulations rather than requesting a ruling of law or relying upon his own legal submissions (A1093-1094, 1098, 1148). IRIB also introduced its own regulations into evidence as an exhibit (A1636-1650). (Predictably, given Khodapanahi's myriad inconsistencies, the regulations contradicted Khodapanahi.) IRIB continued to rely upon its testimony as to the law in Iran during summation (A1416, 1422).

Prior to Mr. Bourguet's testimony, IRIB objected to the introduction of certain documents describing confiscation of property in Iran. IRIB made it very clear that its only objection was to claiming that IRIB's property was so confiscated. IRIB stated it would object *if* Mr. Bourguet so testified (A1286-1287, A1271, A1274-1275). The trial judge stated that he would field objections as they were made (A1287). Subsequently, Mr. Bourguet did not testify that IRIB's property was confiscated and IRIB made no objection to his testimony. Then, on cross-examination, despite its earlier objection, IRIB itself asked Mr. Bourguet if he had any knowledge of the confiscation of government property. (He did not. A1319-1320). No other objection was stated. No mention of Fed. R. Civ. P. 44.1 or the issue now raised on appeal was made.

Mr. Bourguet's testimony was relevant and factual. In attacking Behroozian's testimony, IRIB attempted to portray life in Iran during 1979 as normal. Iran ridiculed Behroozian because he testified that his house was confiscated, because he testified that he fled Iran, and because he testified that he sought the help of a revolutionary guard in finding the violin, yet feared that the violin would be confiscated by a committee member. Given that IRIB was attacking Behroozian's credibility based on these very matters, Behroozian was entitled to show that these matters were not unusual in Iran in 1979. Mr. Bourguet did so. He described the confiscation, the competing factions, and the activities of the committees (A1294-1300).

Mr. Bourguet's testimony was credible. IRIB did not attempt to offer any testimony in rebuttal. IRIB did not make any attempt to contest Mr. Bourguet's credibility and referred to him in summation as "our distinguished French colleague." IRIB did not contest the substance of his testimony during the trial, nor has it done so on appeal.

Mr. Bourguet did not address any issue of law presented in the case. He did not testify about the ability of the Foundation to transfer title. His testimony was limited to circumstances in Iran, not the governing law.

Given IRIB's failure to object to Mr. Bourguet's testimony and the limits of Mr. Bourguet's testimony, the Court of Appeals properly held that his testimony did not usurp the court's function.

II. IRIB cannot complain of its own jury instructions.

IRIB succeeded in convincing the court to accept its legal theory regarding IRIB's right to reclaim its property from Behroozian, even if it had been sold to Behroozian by the Foundation (another agency of the same government), if IRIB proved that the violin had left its possession by unauthorized means.[5] The trial court so charged the jury, reading IRIB's proposed instruction verbatim. Then, after receiving a verdict it did not like, IRIB claimed for the first time on appeal that the trial court failed to instruct

[5] Typical of its distortion of the record is IRIB's representation that: "Iran's legal experts, Dr. Safai and Dr. Vafai, testified without expert contradiction that unless the Stradivarius was sold to the Foundation in accordance with the regulations, the Foundation had not acquired title and could not convey it." This is false. First, neither Dr. Safai nor Dr. Vafai testified at all. Dr. Safai, an employee of the Government of Iran, submitted a written argument. Dr. Vafai submitted a conclusory statement that Dr. Safai's argument was correct (A377-401, 748-749). Second, neither Dr. Vafai nor Dr. Safai discussed IRIB's regulations. Dr. Safai incorrectly relied upon Iran's General Accounts Law and the Regulations of Government Transactions, which did not apply to IRIB (A736). Inexplicably, IRIB relied upon its less than credible witness Khodapanahi to describe IRIB's own regulations and advance the claim that the transfer was not within these regulations (A1093-1094, 1098, 1148). Third, IRIB's "legal experts" were opposed with a variety of materials, including the relevant laws themselves. See, e.g., Defendants' Memorandum in Support of Requested Jury Instructions (A732-744) and the nine exhibits annexed thereto (which IRIB omitted from its Appendix in the Court of Appeals).

the jury on an essential issue, whether Behroozian could have obtained good title from the Foundation.

In a frivolous appeal, this a totally frivolous claim.[6]

IRIB did not object to the court's instructions pursuant to Fed. R. Civ. P. 51. In fact, the court read verbatim IRIB's proposed instruction on this issue (A1547-1549, 696). Accordingly, IRIB has no basis no raise an objection now. See, *Camalier & Buckley-Madison, Inc. v. The Madison Hotel, Inc.*, 513 F.2d 407 (D.C. Cir., 1975) ["The instruction attacked was authored and requested by Madison's trial counsel (not his counsel on appeal), with the result that Madison is hardly in position to complain." 420 fn. 93]; *Imperial Insurance, Inc. v. Employers' Liability Assurance Corp.*, 442 F.2d 1197, 1201 (D.C. Cir., 1970); *Hobson v. Wilson*, 737 F.2d 1, 31-32 (D.C. Cir., 1984), *cert. denied*, 470 U.S. 1084; and *Biscoe v. Arlington County*, 738 F.2d 1352, 1365 (D.C. Cir., 1984), *cert. denied*, 469 U.S. 1159.

IRIB also has nothing to object to. IRIB requested a charge it believed covered the title Behroozian could receive from the Foundation. It made it clear in argument that its proposed charge covered a transfer from the Foundation (A1387-1388, 1396, 1509, 1532, 1544, 1546), and IRIB's instruction did so. The jury was instructed:

> The rightful owner of property has a right to reclaim his property from either the person originally guilty of the unlawful taking or from anyone who subsequently comes in possession of it. The owner may recover the property from a person who purchases it in good faith from someone other than an owner since a thief cannot pass good title. (A1547-1548)

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[6] IRIB did not find this issue worthy of mention in its petition for rehearing to the Court of Appeals.

The Court of Appeals held that IRIB's instruction covered the issue raised by IRIB on appeal:

> The law regarding the Foundation's authority to transfer good title was embodied in the jury instruction proffered by the IRIB and ultimately tendered to the jury. Having failed to object to this instruction before the jury retired to consider the case, the IRIB may not now object to Mr. Bourguet's testimony or claim that its suggested instruction was erroneous. (839 F.2d 780, at 782)

There is no issue of "plain error." IRIB may now claim it wishes it worded its instruction differently but it cannot claim that no instruction was given on this issue.

CONCLUSION

The petition should be denied for the foregoing reasons.

Respectfully submitted,

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No. 87-2135

IN THE

Supreme Court of the United States

October Term, 1987

ISLAMIC REPUBLIC OF IRAN BROADCASTING,
Petitioner,

v.

N.K. BEHROOZIAN and JERRY ABITBOL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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REPLY BRIEF

I. IRIB "at the time the ruling . . . . [was] made . . . [made] known to the court . . . [its] objection to the actions of the court and the grounds therefore" in accordance with Rule 46, F.R.C.P.

The discussion among trial counsel and the District Court concerning Bourguet's testimony about governmentally-approved confiscations is recorded in over twenty pages of transcript. The District Court ruled no less than four times (App. pp. 171, 174, 183, 187), over IRIB's objection, that Bourguet could testify about such confiscations. The basis of each objection was that the jury might conclude from Bour-

guet's testimony that the government could have confiscated property from a government agency, to wit, the Stradivarius from IRIB. App. 1268-69, 1271-73, 1274-76, 1282-83. Behroozian argued that he was entitled to show the possible ways in which the Stradivarius could have been *properly* transferred from IRIB to the Foundation (from which Behroozian testified he bought the Stradivarius). App. 1269-70, 72-73, 81.

During the third colloquy, counsel argued:

> So if you took something from one of the agencies in the revolution, nobody knowns where it's from. So, therefore, Khomeini says, "Give it back and we'll put it into the public treasury." Once that happens and once Khomeini is the leader of the entire government and does that, *there is no way that somebody who buys it from Khomeini's foundation has any reason to question the title,* and there's no reason for NIRT [IRIB's predecessor] to come along and say, "We were the number one entity. Nobody could take our property away. It could not be confiscated." It was. *It was Khomeini's policy in 1979. There was no higher authority than him.*
>
> But this is just my argument. Mr. Bourguet was there. Mr. Bourguet represented Khomeini. [App. p. 1281, emphasis supplied]

The court then ruled for a third time:

> The Court: Well, let him testify to it. I don't want to hear you and then hear him. Let him testify to that. *If that's a fact,* let him testify to that. [App. pp. 1281-1282, emphasis supplied]

This colloquy and the court's ruling make clear that IRIB gave the grounds for its objection, to wit, that the jury could conclude that there was a legal confiscation. Behroozian stated

that that was precisely what he was entitled to show. The District Court agreed with Behroozian because testimony as to a policy of legal confiscation in the court's view raised a factual issue that the jury was entitled to decide. If we have persuaded this Court that testimony as to the fact of the existence of foreign law is an issue for the court to decide pursuant to Rule 44.1, F.R.C.P., then this ruling was error. But, however this Court should decide that issue, it is entirely clear that IRIB made known to the District Court the grounds for its objection.[1]

It is true, as Behroozian argues (Brief p. 5), that IRIB did not object further after Bourguet began to testify, but it would not have been proper, after four rebuffs, to do so. The testimony Bourguet gave was within the rationale offered by counsel for its admissibility. The testimony clearly tended to show that IRIB property might have been legally confiscated, precisely the basis for IRIB's objection.[2] IRIB should not be required to have objected a fifth time to preserve its objection.

It is also true as Behroozian argues (Brief p. 5), that IRIB itself finally asked Bourguet if he had any knowledge of confiscation of government property.[3] It may also be true that

[1]Respondents' brief (pp. 3-4) may be read to suggest that IRIB was required to refer specifically to Rule 44.1, F.R.C.P., in its objection. No citation of authority, however, is provided for this proposition, and we know of none. Behroozian also argued to the Circuit Court that IRIB had not objected to this testimony. Respondent's Circuit Court Brief, pp. 39-41. Although finding in Behroozian's favor, the court did not rule on this issue.

[2]Respondents' proposed jury instruction XV provided that if Behroozian proved he had purchased the Stradivarius from the Foundation, even if IRIB had shown it was stolen, the jury was required to find for Behroozian by reason of the governmental policy of confiscation and transfer to the Foundation. App.724.

[3]His precise answer was he did not know one way or the other. App. 1320.

Bourguet was a credible witness (Brief p. 5). These circumstances, however, cut against Behroozian's argument. A party does not waive an objection to testimony because it was credible or by trying to rebut it after it has been admitted.

Nor does it help Behroozian's position that IRIB itself erred in submitting legal issues to the jury (Brief p. 4, n. 4). That simply shows that there was another violation of Rule 44.1, F.R.C.P. at the trial. Neither the District Court nor trial counsel appear to have known that testimony as to the existence of foreign law is an issue for the court not the jury. The Circuit Court's decision will importantly add to this misperception among bench and bar because it is the only decision from a court in the United States addressing this issue.

II. The District Court was not relieved of its duty to instruct the jurors, fully and correctly, on the applicable law because IRIB requested an instruction which did not reach the controlling issues.

Dr. Safai, a law professor at Tehran University, testified through a sworn affidavit that the Foundation could not legally transfer the Stradivarius (1) because the ownership of such property was beyond the object and purpose of the Foundtion, (2) because IRIB could not sell the Stradivarius to the Foundation except in accordance with applicable regulations, and (3) because IRIB had no authority to gift the Stradivarius to the Foundation. App. 377-401. Dr. Vafai, a member of the Iranian bar and an Iranian legal specialist at the Library of Congress, in another sworn affidavit, agreed with Dr. Safai. App. 748-749.[4]

[4]Respondents' Brief, p. 6, n. 5, takes issue with IRIB's characterization of affidavit evidence as testimony. A statement is generally considered testimony if it is sworn even though it is written rather than spoken in

Because under Iranian law the Foundation could transfer good title to Behroozian only if it had good title, the circumstances under which the Foundation acquired possession of the Stradivarius presented the crucial factual and legal issues in the case. The theory suggested by Behroozian's evidence was a legal confiscation followed by a transfer to the Foundation.[5] If the jury believed there had been a legal confiscation, Dr. Safai's opinion that IRIB could not gift the Stradivarius to the Foundation or transfer it except in accordance with the applicable regulations would present no obstacle to a jury verdict for Behroozian. Dr. Safai's first point, however, that the possession of a Stradivarious was beyond the object and purpose of the Foundation would still be an obstacle. Putting aside Dr. Safai's first point, however, it is possible that the jury found that IRIB's evidence that it had not transferred the Stradivarius in accordance with the regulations was insufficient to carry its burden of proof.

None of the foregoing problems were addressed in the instructions in the case. The instruction given was correct as far as it went, but it did not address the "controlling issues" in the case. Accordingly, contrary to respondents' brief (p. 8) and contrary to the Circuit Court's opinion, there was "plain error." 9 Wright and Miller, *Federal Practice and Procedure*, Civil §2556, at 654-655, footnotes omitted.

Respondents' Brief takes no issue with IRIB's assertion that the District Court's refusal to apply the "plain error" rule

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open court (Black's Law Dictionary, 5th Ed. 1979, "Testimony"), so the characterization was not misleading. It may be that Drs. Safai and Vafai, as respondents claim, addressed the wrong regulations, but on that hypothesis, IRIB's Khodapanahi addressed the correct ones. It is true that IRIB's experts were opposed with a variety of legal materials, but respondents proffered no expert to explain them. The District Court never indicated that he disagreed with Dr. Safai's and Dr. Vafai's conclusions.

[5]See fn. 2.

where no objection has been made as required by Rule 51, F.R.C.P., is in conflict with decisions of the Second, Third, Fifth, and Eleventh Circuits. It appears, furthermore, that the Ninth Circuit exceeds the District of Columbia Circuit in its hostility to the "plain error" rule and flatly rejects it. *Herrington* v. *Sonoma County*, 834 F.2d 1488, 1500, n. 12 (9th Cir. 1987); *Brett* v. *Hotel, Etc. Emp. & Bartenders Local 879*, 828 F.2d 1409, 1414, n. 7 (9th Cir. 1987). Accordingly, there is substantial disagreement among the Circuits on this issue.

Finally, this Court's opinion in *Newport* v. *Facts Concerts, Inc.*, 453 US. 247 (1981), which held that the City of Newport which had failed to object to a charge authorizing a jury to award punitive damages was not foreclosed from appellate review, supports IRIB's position here. Among the reasons for allowing plenary review in that case were the novelty of the issues, their importance, and the likelihood of the recurrence. The same circumstances obtain here. The Circuit Court's decision here holding that a jury finding that there was an "absence of law" was not inconsistent with Rule 44.1, F.R.C.P. is the leading case on this issue. Because of the United States' increasing involvement with unstable foreign states, this issue is important and likely to recur.

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